



DOCKET 21  
DATE 2-17-11  
HB 542

February 16, 2011

Chairman Gary MacLaren  
House Local Government Committee  
Montana 2011 Legislature

RE: Testimony on House Bill 542, Revise subdivision and platting act

Dear Mr. Maclaren,

I am unable to attend the scheduled February 17 hearing; so, I am submitting my written comments on HB 542 specific to MCA 76-3-608, subsection 8: a requirement for scientific support of agency comment or opinion.

I am a Montana resident and self-employed as an ecological consultant. I hold a B.S in Wildlife Management (MT State Univ., 1978), a M.S. in Zoology (MT State Univ., 1982), and a Ph.D. in Environmental and Forest Biology (SUNY Syracuse, 1992); and have 27 years of experience beyond my M.S. degree. As a Montana resident and scientist, I expect government agencies and their representatives to provide accurate, supportable (i.e., verifiable), and unbiased comment or opinion to decision makers for any issue, including residential subdivisions. Agency comments should be based on the best available information. Provision of accurate and unbiased information is requisite to making well-informed decisions. I have specific experience that is germane to the issue of requiring scientific support of comments and opinions provided by government agencies.

In May 2008 I was retained by Mr. Keith Simon, Kleinhans Farm Estates, LLC, to provide an independent and objective assessment of information on wildlife habitat, and wildlife occurrence and use of the proposed North Shore Ranch Subdivision (NSR), south of Hwy 82, between Somers and Bigfork. My work was providing a second professional opinion on wildlife issues, as the proponent's primary biological consultant's report had received substantial criticism from Montana Department of Fish, Wildlife and Parks (MTFWP) and U.S. Fish and Wildlife Service (USFWS). Also, there were questions concerning claims made by MTFWP and USFWS regarding the habitats and wildlife importance of the NSR property and adjacent areas.

My review found many comments made to Flathead County Planning Office by MTFWP and USFWS personnel to be unverifiable or lacking proper context, and potentially confusing or misleading for decision makers. A few of the many examples are appended to the end of this testimony.

My report to Kleinhans Farm Estates, LLC cited more than 100 references, including data sources, published and unpublished reports, national and regional management plans, textbooks, and peer reviewed journal articles. A few of the information sources were provided by MTFWP, at the request of my client, and by USFWS in compliance with a subpoena. The many sources I cited are only a sampling of the possible reference material.

- The primary factor driving my review of so many resources was an attempt to validate claims made by MTFWP and USFWS in letters the agencies submitted to Flathead County Planning office.
- The level of effort I expended far exceeded that which is normally conducted for land use planning at the county level in Montana.
- Most of the Agency claims were made without reference to supporting evidence.
- My inability to substantiate numerous claims by USFWS and MTFWP does not necessarily mean that the information doesn't exist. I just couldn't find it, which in itself is problematic.

My inability to validate claims, such as the north shore of Flathead Lake being an "area of national significance for its wildlife values" suggests that such statements were made to influence decision makers in a certain direction. Similar statements include:

- Agency comment letters referred to the area as "critical habitat," which has specific connotations to the Endangered Species Act, yet there was no federally-designated critical habitat at NSR.
- Agency letters referred to the area as long-billed curlew habitat (a Montana species of concern). Neither NSR nor FWPA provide what is typically considered breeding habitat for long-billed curlew (i.e., well-drained, open and sparse grasslands). MTNHP (2008,a, 2010) had no records of long-billed for the north shore area, and only one record within 15 miles of NSR (MTHNP 2008, Sauer et al. 2008). Annual management reports from USFWS (1961-2008) did not list any observations of long-billed curlews at FWPA. It was quite unlikely that development at NSR would adversely impact long-billed curlew.
- USFWS commented that the open space planned for NSR "will not provide wildlife habitat;" and MTFWP commented that "the only open space that would function for wildlife is the 70 lowland acres." One only needs to look into their back yard to see that these statements are not true. Without proper context, these statements are misleading.

During deposition, MTFWP's Region One Supervisor stated that they normally do not include citations in their comment letters. During deposition, another MTFWP employee who reviewed and wrote letters for the Supervisor's signature stated, she is "not accustomed, nor do we have the time, nor would my supervisor let me go into deep literature reviews on every subdivision that came across our desk or that we've commented on during those years." The Region One Wildlife Manager acknowledged

the importance of peer-reviewed literature during deposition. These statements clearly identify part of the problem. One of the purposes of citing references is to lend credibility to statements and conclusions presented in a document. Citing references enables others to validate statements and conclusions. Also, reviewing numerous information sources aids in the formulation of ideas and helps to offset biases. We all have biases, even our opinions based on experience and education have a touch of bias. Conducting literature reviews and considering multiple sources of information is one of the best defenses against interpretation.

Based upon my experience with the NSR project, one of the primary shortcomings of MTFWP's and USFWS' written comments to Flathead County concerning the proposed NSR subdivision was their failure to adequately review the literature and provide proper context for many of their statements. Laypeople, including planning staff and decision makers, generally are not equipped to filter statements from resource specialists and readily recognize biases in those statements. While it may be a practice for non-profit advocacy groups to press claims based on partial information or information taken out of context, it is totally inappropriate for public servants to do so, inadvertently or deliberately.

Requiring commenting agencies to cite their sources and make available those sources can only improve the planning process. This will enable the project proponent, decision makers, and the public to better understand the issues associated with a project, while allowing anyone to research the same information, identify shortcomings, and recommended other information to be considered. Simple "expert opinion" in the absence of supporting information should be avoided.

Thank you for the opportunity to comment on this portion of HB 542,

Sincerely,

Pete Fiegley

**1. Agency Comments on Habitat and Species Descriptions**

- a. Joe Elliott, Ph.D. prepared a report on the biological resources at NSR and surrounding area and identified likely impacts and potential mitigations. Dr. Elliott correctly characterized the NSR property as consisting mostly of cultivated land and several residences, and that this pattern characterized much of the adjacent areas. Dr. Elliott further stated that many of the wildlife species are typical of those that adapt to, or in some instances, thrive in human-disturbed landscapes. He made no judgments regarding the value of wildlife in Flathead Valley.
  - b. In a July 17 email correspondence from MTFWP Region One personnel to Flathead Planning Office, MTFWP mischaracterized Dr. Elliott's report stating that "In general, it seems to me Dr. Elliot's opinion is that the Flathead Valley no longer has any important or significant wildlife values left because of both agriculture practices and subdivision."
  - c. July 19, 2006 from USFWS Biologist, Lost Trail NWR to Flathead County Planning Office criticized Mr. Elliott's report and indicated that many species documented in an earlier letter are not adapted to human development and disturbance.
  - d. My review of current, readily-available information (MTNH 2008,a,b,c, 2010), North American Breeding Bird data over a 10-year period (Sauer et al. 2008), Flathead Waterfowl Management Area (FWPA) annual reports (USFWS 1961-2008), and an Environmental Assessment for erosion control activities at FWPA (USFWS 2008a), just to cite a few, confirmed Dr. Elliot's descriptions and conclusions and did not support many claims by USFWS and MTFWP. UFWS (2008a) determined that on the adjacent FWPA, "Much of the wildlife associated with the WPA has adapted to the noise and disturbance associated with urban development" and documents from USFWS (1961-2008) indicate that much of the habitat at FWPA has been altered, "The majority of grassland units are subirrigated or flooded from late May through October due to maintenance of high lake levels. Meadow foxtail, quackgrass, sandberg bluegrass, and reed canarygrass dominate the grassland, resulting in only fair to poor nesting cover. No native grasslands remain."
2. MTFWP (MTFWP Region One Supervisor, letter to Flathead County Planning Office, March 26, 2008) "views the North Shore of Flathead Lake and the Flathead Lake WPA as an area of national significance for its wildlife values..."
- a. The readily-available data from MTNHP (2008, a, b, c) and information provided by MTFWP to NSR representatives did not support the claim of national significance with respect to waterfowl, shorebirds and waterbirds. MTFWP studies suggested that the Flathead River and associated riparian habitat, sloughs, backwaters, and oxbow ponds, and delta were important for a variety of species, including grizzly bears. The reports did not ascribe preeminent importance of FWPA and the northern shore of Flathead Lake.
  - b. I examined the National Waterfowl Mgt Plan NAWMP (2004,a), Intermountain West Waterbird Conservation Plan (Ivy and Herzinger 2006), and Intermountain

West Shorebird Plan (Oring et al 2000) and found no reference to Flathead Lake or the north shore of Flathead Lake, although other sites in Montana were noted in these documents.

- c. I found one publication (Mahr and Jones 2005) that identified high avian diversity in the Flathead Basin, but the data for this report did not cover FWPA or NSR.
- 3. MTFWP (Region One Wildlife Manager, letter to Flathead County Planning Office, June 22, 2006) indicted that the "north shore wetlands and scrub-shrub habitats are also important to semi-aquatic furbearers such as mink, muskrats, river otter, and beaver, and for many other species of wildlife." MTFWP's own report did not substantiate this claim relative to beavers and otters.
  - a. MTFWP study of the effects of effects of water level fluctuation on aquatic furbearers (Bissell and Brown 1987).
    - i. Wetland habitats created along the lake shore by the operation of Kerr Dam did not provide new habitat for beaver . The authors speculated that prior to the operation of Kerr Dam, the best beaver habitat along the north shore was found at the river delta and lower Flathead River shorelines. "The remaining shoreline probably never supported year-round beaver habitat."
    - ii. The authors speculated that prior to operation of the Kerr Dam, it was unlikely that river otters would have made extensive use of the shoreline between Bigfork and Somers due to rough water and lack of suitable den sites.

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